

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 9, 1998

Re: Sections 603(d)(1), 604(b), 606, 607(e), 609, and 610 of the Fair Credit Reporting Act.

Dear Mr. Beaudette:

This is in response to your letter requesting the Commission staff's views on a number of issues related to the Fair Credit Reporting Act (FCRA). We understand that your company provides screening services for employers. In your letter, you state that these services include criminal history searches, identification and Social Security number checks, education verifications, employment verifications, and reference checks.

Before turning to your specific questions, I will address whether your company's activities involve "consumer reports" and whether your company is a "consumer reporting agency" (CRA) under the FCRA. Section 603(d)(1) of the FCRA defines the term "consumer report" broadly. In addition to credit information, any information that touches upon an individual's "character, general reputation, personal characteristics, or mode of living" is covered by the definition. The searches that you list -- criminal history searches, education verifications, employment verifications, and reference checks -- touch upon one or more of the characteristics set forth in Section 603(d)(1). Accordingly, the activities that you describe in your letter involve "consumer reports."

From your description of the services that your company offers, your company is a "consumer reporting agency" as the term is defined in Section 603(f) of the FCRA. Section 603(f) defines a CRA to mean any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. Accordingly, the following discussion is based on the premise that your organization is a CRA.

As to the specific questions you pose, we have the following comments (some of your questions have been modified slightly to facilitate discussing the various provisions of the FCRA):

1. Does a CRA that performs a criminal records check for employment purposes have to get written authorization, provide the disclosure required by Section 604(b), and then, before any adverse action is taken, provide a copy of the report with a summary of consumer rights?

As I stated above, a criminal records check is a consumer report when done by a CRA such as your company. Section 604(b) sets forth specific procedures that must be followed when such consumer reports are used for employment purposes. This provision imposes obligations upon both the CRAs that provide reports for employment purposes and the employers who use the reports.

Duties of CRAs: A CRA that provides consumer reports for employment purposes, such as the criminal records checks that you provide, is required by Section 604(b)(1) to obtain certification that the client obtaining the report is in compliance with Section 604(b)(2), will comply with Section 604(b)(3) as appropriate, and will not use any information contained in a consumer report in violation of any applicable federal or state equal opportunity law or regulation.

Duties of Employers: Sections 604(b)(2)(A) and 604(b)(2)(B) require employers who obtain consumer reports for employment purposes to disclose this fact to each affected consumer and to obtain the consumer's written permission before a report is obtained. In addition, before any adverse action is taken based upon information in the report, Section 604(b)(3) requires the employer to provide to the consumer a copy of the report and the summary of consumer rights prescribed by the Commission. (Once an adverse action is actually taken, the employer also must comply with Section 615(a) and provide an adverse action notice.)⁽¹⁾

2. If a CRA obtains a criminal records check from a second CRA, must the first CRA provide the identity of the end-user to the second CRA?

Yes. For the reasons discussed above, a criminal records check transmitted by a CRA is a "consumer report." When a CRA, such as your company, obtains a consumer report from another CRA, it is procuring a consumer report for the purpose of reselling the report. It is therefore subject to all the requirements of the FCRA that apply to CRAs that are resellers, including the requirement of Section 607(e) to identify the end-user to the CRA from which they procure reports. Resellers who are concerned about identifying their clients to competitors may wish to deal with this issue through contract provisions. The attached staff opinion letter (*Rosen*, 6/9/98) discusses the provisions and application of Section 607(e) in more detail.

3. An employer requests that the CRA conduct telephone interviews with third parties such as colleges, past employers, and references named by the job applicant (but requests no credit reports). Is any report based on this information an "investigative consumer report" covered by Section 606?

An "investigative consumer report" is defined by Section 603(e) as a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews. This type of report is particularly invasive of a consumer's privacy; accordingly, Section 606 provides special procedures that must be followed when investigative consumer reports are procured.

The term "interview" is key to coverage by Section 606. The staff of the Commission does not believe that verifying factual information that a job applicant has offered during the application process with the custodian of the information -- such as the date that an applicant graduated from college -- constitutes an "interview" for Section 606 purposes, even though the information is verified by telephone or personal contact with the college. Thus, this information is not investigative consumer report information. (The information is, however, "consumer report" information and should be treated as such.) On the other hand, if a CRA asks individuals at the college questions that go beyond verifying facts -- such as whether the applicant was a "good" student or took drugs -- the information gathering

involves an "interview" and triggers the provisions of Section 606. The distinction is between simply verifying with the source of the information specific facts about education, employment, or other information that the applicant has provided to the employer ("consumer report") and obtaining more general character or personal characteristics information through interviews ("investigative consumer report").

4. Do Sections 609 and 610 apply to your employer screening company, or is your company an extension of the employer?

You state that your company is in the business of providing various types of reports for employers, such as reference checks and verification of education and past employment. Employers pay your company to produce these reports. Your company is not simply an extension of these employers for FCRA purposes; rather, it is an independent entity hired by employers and meets the definition of a "consumer reporting agency" in Section 603(f) of the FCRA. Because your company is a CRA, you must comply with all of the provisions of the FCRA that apply to CRAs, including Sections 609 and 610.

5. If credit reports are not used, does the FCRA apply?

As noted above, the FCRA covers many types of information other than credit reports. For instance, when a CRA such as your company checks criminal records, court records, or education records, the reports it provides to its customers are consumer reports covered by the FCRA, and your company must comply with all the FCRA provisions that apply to CRAs.

6. When your employment screening company is given personal reference names and other contact information with the applicant's permission, is the company creating an investigative consumer report when its employees interview those references and report the results to the employer?

Any report by a CRA that results from personal interviews (including telephone interviews) with neighbors, friends or associates of the applicant, or others with whom he or she is acquainted or who may have knowledge of the applicant, and contains information as to character, general reputation, personal characteristics, or mode of living is an investigative consumer report subject to the special procedures set forth in Section 606. Since reference checking almost always involves asking questions about character, general reputation, personal characteristics, or mode of living, the reports based on these interviews are likely to constitute investigative consumer reports.

7. If these reports are investigative consumer reports, do we have to comply with the FCRA provisions dealing with consumer reports, consumer reports for employment purposes, and investigative consumer reports, or just those provisions dealing with investigative consumer reports?

The FCRA defines an "investigative consumer report" as a particular type of "consumer report." Thus, an employer who uses investigative consumer reports must comply with the provisions of the FCRA that apply generally to "consumer reports" (such as Sections 604(b) and Section 615(a)) as well as the provisions that apply specifically to investigative

consumer reports (Section 606).

I hope that this information has been helpful to you. The statements contained in this letter represent the opinions of the Commission's staff and are advisory in nature. They do not necessarily represent the position of the Commission or of any individual Commissioner.

Sincerely,

William Haynes
Attorney
Division of Credit Practices

Enclosure

1. An employer may contract with a CRA for the CRA to perform the employer's ministerial duties under the FCRA. Thus, your employer clients may arrange for you to make the disclosures, obtain written permission, and provide the notices required by these provisions. If you assume these responsibilities, you should ensure that your procedures comply with the FCRA. Your employer clients, however, remain liable for any violations of the law that result from your actions.